

Supreme Court, U. S.
F I L E D

JUL 29 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM 1976

Case No. 76-131

CLIFFORD J. HYNNING AND CAROL H. SMITH,
Petitioners,

v.

GLADYS L. BAKER, ET AL.,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA**

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CLIFFORD J. HYNNING AND CAROL H. SMITH,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioners, Clifford J. Hynning (hereinafter called the debtor) and Carol H. Smith (hereinafter called the joint tenant), pray that a writ of certiorari issue to the Supreme Court for the State of Virginia.

OPINIONS BELOW

The Commissioner in Chancery issued a typewritten report dated December 17, 1974, excerpted in the Appendix (at page 1a); the trial court's informal letter judgment is dated April 29, 1975 (Appendix 4a); and the memorandum judgment of the Supreme Court of Virginia is dated April 30, 1976 (at 6a).

JURISDICTION

This petition was filed in typewritten form within 90 days of the final judgment of the Supreme Court of Virginia, together with a motion to substitute the printed petition for certiorari as soon as available. The date of the judgment of the Supreme Court of Virginia is April 30, 1976. The court's jurisdiction is invoked under 28 USC 1257(3).

QUESTIONS PRESENTED

In an action by judgment creditors to compel the sale of real estate held by the debtor in joint tenancy with another, petitioners consider the following issues are presented:

Is a debtor's constitutional right against the deprivation of property without due process of law violated by a trial court's findings of fraud wholly on a presumption based on allegations contained in a brief filed by judgment creditor ("badges of fraud") without any rational relationship to or tangible support by evidence in the record?

Are the constitutional rights of a joint tenant, who acquired her joint interest on the basis of fair and adequate consideration, violated by a trial court's presumption of fraud without a scintilla of evidence or finding of fact connecting the joint tenant with any intent or knowledge of fraud?

Is the Supreme Court of Virginia (and, consequently, the trial court) bound by its own regulation of the rules of practice relating to verification in pleadings (here answers to interrogatories)?

If the courts of Virginia are so bound by their own promulgated rules of practice, was petitioners' constitutional right to a fair trial denied by the trial court's

disregard of the specific provisions of the rules of court on lack of verification and the courts' consequent disregard of the answer to interrogatories by counsel, unverified, except as "admissions against interest"?

CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

The 14th Amendment to the Constitution of the United States, which reads, in part, as follows: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Virginia Code, § 55-80, which reads, in part, as follows: "*Void fraudulent acts; bona fide purchasers not affected.* Every gift, conveyance, assignment or transfer of, or charge upon, any estate, real or personal given with intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are or may be lawfully entitled to shall, as to such creditors, persons or other persons, their representatives or assigns, be void. This section shall not affect the title of a purchaser for valuable consideration, unless it appears that he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void such title of such grantor."

Virginia. Rules of the Supreme Court of Virginia. "Rule 1:10. *Verification.* If a statute requires a pleading to be sworn to, and it is not, or requires a pleading to be accompanied by an affidavit, and it is not, but contains all the allegations required, objection on either ground must be made within seven days after the pleading is filed by motion to strike; otherwise the objection is waived. At any time before the court passes on the motion or within such time thereafter as the court may prescribe, the pleading may be sworn to or the affidavit filed."

STATEMENT OF THE CASE

This case comes to the Supreme Court on a *per curiam* affirmance by the Virginia Supreme Court of the judgment of the Circuit Court of Arlington County, which adopted and confirmed a commissioner's report setting aside a conveyance creating a joint tenancy as fraudulent.

The action was in the nature of a creditor's bill to have certain real estate owned by Defendants sold to satisfy judgment recovered against the debtor alone. Aside from testimony regarding dollar claims of creditors, the only evidence before the lower court and the commissioner were the interrogatory answers, the documents produced by Hynning and the land records of Arlington County.

On September 9, 1971, Hynning, widower and not remarried, conveyed certain real estate situate in Arlington County to himself and his daughter, Smith, as joint tenants with common-law right of survivorship. The consideration for the creation of the joint tenancy was the sum of approximately \$42,000 flowing from Smith to Hynning in the form of forgiveness of a promissory note in the amount of \$22,000 from Hynning to his late wife, which had been bequeathed to Smith, and the transfer of the proceeds of insurance policies on the late wife received on behalf of Smith. Hynning answered the interrogatories through counsel, stating in detail the above consideration.* The promissory note in the amount of \$22,000 had been set forth in the probate records of

* The answer to interrogatories was as follows: "4. Under the Last Will and Testament of Martha H. Hynning, the deceased wife of Defendant, probated in Arlington County, Virginia, Carol H. Smith (nee Hynning) was bequeathed a promissory note in the face amount of \$22,000 (secured by a deed of trust on 3700 N. Military Road, Arlington, Virginia). Mrs. Smith was also the beneficiary of insurance policies aggregating \$22,000. Thus, \$42,000 was the pecuniary consideration for the conveyance of 17 September 1971, in addition to other considerations."

Arlington County at the time of probate of the estate of the late Martha H. Hynning (Will Book 53 at p. 243 and Fiduciary Settlement Book 0-3 at p. 384). The proceeds of the insurance policies on the late Martha H. Hynning were evidenced by bank deposit tickets dated June 21, July 13 and 14, 1965, submitted in response to a *Subpoena Duces Tecum*. In response to interrogatories on net worth, the debtor stated that his net worth had ranged from approximately \$699,000 as of March 23, 1970, to \$439,000 as of June 7, 1972. These answers to interrogatories were filed on June 10, 1974. The commissioner found that, at this time, there were only \$8,000 of judgments outstanding in addition to deeds of trust.

On September 10, 1974, a counsel for a creditor objected to the answers to the interrogatories as not having been filed under oath, notwithstanding Rule 1:10 of the Virginia Supreme Court rules, which provide that technical objections to verification are waived unless made within seven days of the filing of the pleading. Under this rule, these objections should have been made by June 18, 1974. The objection was made on September 10, almost three months after the deadline of the Virginia rules.

When it became apparent that counsel for the creditors would rely wholly on the above without presenting evidence of their own, counsel for petitioners requested a full evidentiary hearing on the allegations of alleged fraud and requested proof thereof by the creditors. This was ignored by the commissioner, who on December 17, 1974, filed his report (1a), holding that the 1971 conveyance was void as a fraudulent conveyance in violation of § 55-80 1950 Code of Virginia, as amended. Exceptions were filed to this report which were confirmed by the trial court on April 29, 1975 in a brief informal letter memorandum (4a) the trial court ordered a sale of the property, suspended by bond. The Supreme Court of Virginia affirmed in a *per curiam* order (6a).

REASONS FOR GRANTING THE WRIT

The informal, highly casual and tersely uninformative manner in which the part-time commissioner in chancery (1a), the circuit judge (4a), and the Supreme Court of Virginia (6a) made their successive rulings in this case make it somewhat awkward to set forth the findings of fact and the conclusions of law. The part-time commissioner in chancery apparently did not choose to have time to set forth in his own words the findings of fact or conclusions of law, and incorporated by reference an entire letter filed with him by counsel for one of the creditors (A²⁶). The circuit judge affirmed the commissioner's report as supported by "the totality of the evidence," excepting, apparently, the issue on the alleged lack of consideration for the creation of the joint tenancy (2a). What remains of "the totality" is far from clear.

The Supreme Court of Virginia was equally unilluminating in its judgment, stating it was "of the opinion that there is no reversible error in the decree appealed from, thus rejects said opinion, and refuse said appeal . . ." (6a).

1. The constitutional rights of a debtor were violated by the courts below in finding fraud solely on a presumption derived from written arguments ("badges of fraud") of counsel for a creditor and without any base in the record and without any finding of knowledge or intent of fraud, and thereby deprived the debtor and the joint tenant of property without due process of law in violation of the 14th Amendment to the Constitution of the United States.

For want of anything in writing by the court system of Virginia, setting forth either the findings of fact or the conclusions of law, petitioners have perforce gone to the letter of counsel for one of the creditors to find the facts and the law of this case. This is where the damn-

ing phrase, "badges of fraud" comes from (2a). True, the commissioner had said "nearly all of the badges of fraud are present in this case" (2a). If the evidence was so overwhelming, one would expect the commissioner to be able to document or specify what "badges of fraud" were present in this case. The part-time commissioner refrained, scrupulously, from doing so. His opinion, as well as the opinion of the Circuit Court, is bereft of any illumination on what "badges of fraud", either the commissioner or the circuit judge were writing about as reasons for their decisions. The letter of the creditor's counsel listed six badges of fraud, as does the editorial comment of the Virginia Digest, from which presumably the creditor's counsel took his enumeration.

The first "badge of fraud" cited by the creditor's counsel is the relationship of Hynning and Smith, in that Smith is the married daughter of Hynning. Is that evidence of fraud? Neither the commissioner nor the circuit court said so.

Grantor's insolvency is cited by the creditor's counsel as the second "badge of fraud", but the creditor's counsel in the same breath conceded there was no evidence of insolvency. Is "no evidence of insolvency" evidence of fraud? Again, neither the commissioner nor the circuit court said so.

The third "badge of fraud" cited by creditor's counsel, is the pursuit of grantor by his creditors. When does debt become tantamount to fraud? Again, neither the commissioner nor the circuit court said so, and this Court has held specifically to the contrary in *Manley v. Georgia*, 279 US 1 (1929) in voiding a Georgia statute making proof of insolvency *prima facie* evidence of fraud on the part of bank directors.

"Mere legislative fiat may not take the place of fact in the determination of issues involving life, lib-

erty, or property . . . Inference of crime and guilt may not reasonably be drawn from mere inability to pay demand deposits and other debts as they mature . . . The connection between the fact proved and that presumed is not sufficient" (at pp. 6-7).

The fourth "badge of fraud" cited by the creditor's counsel is lack of consideration. Although the promissory note, the deed of trust and the proceeds of insurance policies had been spread contemporaneously on the probate and inheritance tax records of Arlington County, Virginia, the creditor's counsel contended they had not been shown. The circuit judge was sufficiently uncomfortable over the public record of the note and the insurance policies that he noted consideration was "only one of the badges of fraud" and chose to rely instead on the "totality of the evidence," without submitting a single specification of any kind. If the circuit court did not find lack of consideration, what remains as evidence of fraud under this enumeration? That cover-up phrase, "the totality of the evidence" answers nothing on this record.

Item five in the list of "badges of fraud" cited by the creditor's counsel is that Hynning has continued to live in his house. Is living in a house by one of the joint tenants evidence of fraud? Neither the commissioner nor the circuit court said so.

The sixth "badge of fraud" cited by the creditor's counsel is fraudulent incurrence of indebtedness after the conveyance, but the creditor's counsel, for once, conceded that no evidence had been presented on this point.

What this comes down to is that certain creditors have not been paid and they are shouting fraud. But they produced no evidence of fraud. Fraud had been charged in the creditor's pleading solely in terms of "lack of consideration" to be refuted by the evidence of record, *op. cit.*, pp. 4-5, and presumed by the commissioner who ordered the conveyance set aside on ground of fraud. The

circuit judge abandoned the only specific ground cited, namely, lack of consideration, and upheld, in a puzzling *non sequitor*, the order setting aside the conveyance on ground of fraud "on the totality of the evidence." To deprive petitioners of their property under these circumstances is indeed a travesty of justice in violation of their constitutional rights to due process.

This Court has on several occasions invalidated state statutes for presumptions involving fraud where the presumption did not disclose any connection between the facts proven and the facts presumed. Thus, in *Bailey v. Alabama*, 219 US 219 (1911) at p. 233, a statute which treated a breach of contract of labor as *prima facie* evidence of intent to defraud an employer of money paid by him in advance, was found by this Court to be constitutionally vulnerable. The trial court had disregarded evidence rationally bearing upon fraud—as here was the evidence of consideration—and decided upon evidence pertaining to an unrelated breach of contract—the failure to pay a debt, as here—with the consequence that an adequate hearing on the fraud charge had not been afforded. That is precisely this case except that the presumptions here were made by the judge through judge-made law rather than legislative action. As this Court then said in *Bailey*, "It is no answer to say that the jury must find, and here found, that a fraudulent intent existed. The jury by their verdict cannot add to the facts before them. If nothing be shown but a mere breach of a contract of service and a mere failure to pay a debt, the jury have nothing else to go upon, and the evidence becomes nothing more because of their finding (at p. 233)." Note that this case was decided on the 13th Amendment so that no consideration was given to the argument also made under the 14th Amendment. Also see *Manley v. Georgia*, 279 US 1 (1929) *op cit.*, at p. 0, decided under the 14th Amendment.

It is axiomatic that fraud must be expressly pleaded and proven (*McClintock v. Royall*, 173 Va. 408) and that such proof must be by clear, cogent and convincing evidence, fraud *never being presumed* (*Hutcheson v. Savings Bank*, 129 Va. 281). The only allegation of fraud is found in the creditor's intervening petition stating in paragraph five thereof, that the transfer is void as a fraudulent conveyance because not supported by sufficient consideration. Such a conclusory allegation is not sufficient to meet the requirement of pleading with particularity where fraud is involved. This is the law under the Federal Civil Rules, Rule 9, as well as under the laws of Virginia, and common justice.

Moreover, an allegation that a particular transfer of property is void as a fraudulent conveyance must be grounded in evidence that the knowledge of the fraudulent intent was clearly brought home to the grantee. Virginia Code, § 55-80, *op. cit.*, p. 0. Also see *Herring v. Wicker*, 70 Va. (29 Gratt.) 628; *Garland v. Rives*, 25 Va. (4 Rand.) 282. Here, not only is there no such finding by either the commissioner or the court, but there is absolutely no evidence on the record to support or even suggest such a finding.

2. Rules of court are as binding on courts and litigants as regulations are binding on the executive and cannot be ignored to the detriment of litigants acting in reliance thereon. Thus, in reaching the ruling, the courts below disregarded specific provisions of the Rules of the Virginia Supreme Court providing that lack of verification in pleadings (herein answers to interrogatories) must be timely objected to or otherwise waived, and the courts below consequently rejected the answers by the debtor to interrogatories except as "admissions against interest" in violation of the constitutional right to a fair hearing.

The refusal of the Virginia courts to follow their own rules on evidentiary hearings have deprived Petitioners

of property without due process of law in violation of the 14th Amendment to the Constitution of the United States; and such rules of practice are binding on courts as well as on litigants. This Court has long held that regulations promulgated by executive agencies are binding on the President and the executive departments. See *Vitarelli v. Seaton*, 359 US 535 (1959), cited with approval by this Court as recently as in *Nixon v. United States*, 418 US 683 (1974).

Rule 1:10 of the Rules of the Supreme Court of Virginia are clearly binding on litigants and courts alike. The failure of creditor's counsel to make a timely objection to the filing of answers to interrogatories by counsel rather than under oath was not timely made and was consequently waived under the specific provisions of the Rule. For the Virginia courts to ignore their own rules was, in Karl Llewellyn's brutal phrase, a "sin against the nature of our case law" for a court "deliberately to turn the back upon a pertinent but uncomfortable authority, leaving it unmentioned and therefore leaving the question upon as to how the matter now really stands . . ." *The Common Law Tradition*, p. 256. In consequence, the court jeopardizes not merely its "credit for candor, it is its credit for fairness" that is called into question. *Ibid*, p. 258. This was an error by the commissioner and the courts of Virginia of constitutional proportions, in denying a fair hearing and deprived petitioners of valuable property without due process of law in violation of the 14th Amendment to the Constitution of the United States.

CONCLUSION

The issues presented in this petition involve constitutional rather than statutory authority and the binding effect of the court's promulgated rules of practice on the courts themselves. If the rule-making and law-

judging authorities are immune from their own promulgated law, the Constitution is damaged as much as by a lawless executive. Lawless courts are indeed a contradiction of terms at least as long as this Court sits. This calls for the intervention by this Court into areas it normally chooses to leave to the states except where a gross abuse of justice has been committed in violation of the clear constitutional guarantees of the 14th Amendment. The Constitution requires nothing less.

The justifications for the rulings below are in terms of informality and terseness. A part-time commissioner in chancery could not either find the time or the inclination to state on paper his reasons and authorities, so, with candid indolence or outrageous abdication of the judging function, he incorporates by reference as the law of the case a letter to him from counsel for one of the creditors. The trial judge recognized that there was difficulty in sustaining the commissioner's report on the only ground of fraud mentioned in the report, namely the lack of consideration, but the judge then belittled the significance of that ground as "only one of the badges of fraud relied upon by the commissioner," whose report was sustained "on balance by the totality of the evidence." Is this anything but a judicial cover-up of drum-head justice, or—an apter comparison—a nightmarish farce out of Dickens?

Again the circuit judge could not be bothered with stating his reasons or his findings of fact; inconvenient violations of the promulgated rules of practice of Virginia are dealt with by being ignored. Elemental requirements of a due process hearing were flouted.

The issues of justice and fairness under the 14th Amendment must be faced squarely and resolved resolutely in the interests of judicial candor and fairness. They should not be settled by suppression of inconvenient facts or deliberate avoidance of pertinent but

uncomfortable authority. Their resolution cannot be put on the backs of an argumentative memorandum submitted by counsel for a creditor who thus is permitted to exercise the power of judging in his own cause. That would constitute in effect an unconstitutional delegation of the judging function.

For the foregoing reasons, it is respectfully submitted that a writ of certiorari issue to the Supreme Court of Virginia.

Respectfully submitted,

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APPENDIX

APPENDIX

EXCERPTS FROM REPORT OF COMMISSIONER IN
THE CIRCUIT COURT OF ARLINGTON COUNTY,
VIRGINIA, CHANCERY NO. 23183

"Your Commissioner further finds that an order was entered in this cause on May 24, 1974, directing CLIFFORD J. HYNNING to answer in writing and under oath the interrogatories submitted to him by LOUIS H. BEAN, Intervenor, on or before July 10, 1974. Your Commissioner further finds that the said answers to interrogatories were filed on June 10, 1974 by Counsel for CLIFFORD J. HYNNING and were not under oath as directed by Court; however, your Commissioner considers them as admissions against interest and found that they were incomplete and evasive.

"Your Commissioner further finds that there was no settlement statement made to show this transfer and no appraisal was done on the property to show the valuation. Your Commissioner further finds that the said CLIFFORD J. HYNNING failed to produce [p. 9] sufficient evidence of consideration received by him for the transfer of this property by him to himself and his daughter; namely, a \$22,000.00 promissory note and certain insurance policies aggregating \$20,000.00 as directed in the *Subpoena Duces Tecum* issued by the Clerk of the Court on August 22, 1974.

"Your Commissioner further finds that the said CLIFFORD J. HYNNING is still in possession of the said property and that his daughter, CAROL HYNNING SMITH, has failed to appear or offer evidence, although she is represented by the same Counsel who represents MR. HYNNING.

"Your Commissioner is of the opinion, based on the evidence, that the evidence shows a *prima facie* case of

fraud and the burden shifts to the upholder of the transaction to establish its fairness. This he has failed to do. Nearly all of the badges of fraud are present in this case. Fraud can be clearly inferred from the facts and circumstances involved here that MR. HYNNING has attempted by this conveyance to hinder, delay and defraud his creditors by wrongfully withdrawing his property from the reach of the said creditors.

"Your Commissioner further finds from his examination of the title and from all the evidence presented in this cause, including MR. HYNNING's admission and his failure to admit certain facts through his interrogatories, that the deed from CLIFFORD J. HYNNING to CLIFFORD J. HYNNING and CAROL H. SMITH, as joint tenants with the common law right of survivorship to the survivor of either of them, dated September 9, 1971 and recorded September 17, 1971 [p. 10] in Deed Book 1765 at page 497 among the said County land records is a void and fraudulent conveyance as defined by Section 55-80 of the Code of Virginia, and that the Complainant, GLADYS L. BAKER, and Intervenor, LOUIS H. BEAN, are entitled to have the whole property sold to satisfy the lien creditors as set forth in ITEM TWO of this report. Your Commissioner adopts as his memorandum of the law in this case TERRANCE NEY's letter dated September 10, 1974, filed herein." [p. 11] [Annexed hereto in excerpts.] Iverson H. Almand, Commissioner in Chancery.

Excerpts from Mr. Ney's September 10, 1974 letter are as follows:

"Circumstances which are indicative of fraud are often referred to as badges thereof. These circumstances are:

1. The relationship of the parties.

2. The grantor's insolvency.
3. Pursuit of the grantor by his creditors.
4. Want of consideration.
5. Retention of the possession of property by the grantor.
6. Fraudulent incurrence of indebtedness after the conveyance. Here, nearly every badge is present.

1. *The relationship of the parties.* Carol Hynning Smith is the grantor's daughter.

2. *Grantor's insolvency.* While there is no evidence that the grantor was either solvent or insolvent there were two unsatisfied money judgments in Arlington County outstanding at the time of this particular conveyance.

3. *Pursuant to the grantor by his creditors.* Again, two unsatisfied money judgments were outstanding at the time of the conveyance, including those which are involved in this particular suit.

4. *Want of consideration.* The alleged consideration—a promissory note and proceeds of certain insurance policies—has not been shown. Again, the non-response to the *Subpoena Duces Tecum* makes this clear.

5. *Retention of the possession of the property by the grantor.* Mr. Hynning has continued to live in the subject property. [p. 3]

6. *Fraudulent incurrence of indebtedness after the conveyance.* No evidence has been presented with regard to this point." [p. 4]

CIRCUIT COURT OF ARLINGTON COUNTY
VIRGINIA

April 29, 1975

William L. Winston

JUDGE

PAUL D. BROWN

JUDGE

CHARLES S. RUSSELL

JUDGE

CHARLES H. DUFF

JUDGE

WALTER T. MCCARTHY

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Re: In Chancery No. 23183
Baker v. Hynning, et al

Dear Mrs. Hackman and Gentlemen:

I have carefully reviewed the findings of the Commissioner, the Interrogatories contained in the file and responses thereto, and also the able arguments of counsel at the hearing on exceptions duly filed to the Commissioner's report, and hasten to advise you of my conclusions.

With respect to the exceptions preserved on behalf of his client by Mr. Simmons, I am of the opinion that the requested fee of \$2,000.00 plus costs advanced of \$333.33 is reasonable and is hereby approved.

With respect to the exceptions presented by Respondents Hynning and Smith, it is the duty of the Court to review the evidence and to weigh the same according to recognized norms. After so doing I am of the opinion that the Commissioner's findings are supported by the record made in the case, and accordingly will be affirmed. In this connection the duty of the Court is to review the evidence upon which the Commissioner's findings were based and accordingly I do not feel it appropriate to consider other than the evidence before the Commissioner.

It should be observed that the issue made in argument of the missing note goes only to the question of lack of consideration which in turn is only one of the badges of fraud relied upon by the Commissioner. On balance, his findings are supported by the totality of the evidence.

If prevailing counsel will prepare an appropriate order and present the same to opposing counsel for approval as to form and the preservation of exceptions as desired it will be promptly entered.

Very truly yours,

/s/ Charles H. Duff
CHARLES H. DUFF
Judge

CHD:kw

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 30th day of April, 1976.

The petition of Clifford J. Hynning and Carol H. Smith for an appeal from and supersedeas to a decree entered by the Circuit Court of Arlington County on the 20th day of June, 1975, in a certain chancery cause then therein depending, wherein Gladys L. Baker was plaintiff and the petitioners and others were defendants, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that there is no reversible error in the decree appealed from, doth reject said petition, and refuse said appeal and supersedeas, the effect of which is to affirm the decree of the said circuit court.

A Copy,

Teste:

Howard G. Turner, Clerk

By: /s/ Richard R. [Illegible]
Deputy Clerk

Record No. 751360

Supreme Court, U. S.
FILED

AUG 27 1976

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-131

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Petitioners,

v.

GLADYS H. BAKER, *et al.*,
Respondents.

RESPONDENT LOUIS H. BEAN'S
BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI

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(i)

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-131

CLIFFORD J. HYNNING, *et al.*,
Petitioners,

v.

GLADYS H. BAKER, *et al.*,
Respondents.

RESPONDENT LOUIS H. BEAN'S
BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI

Respondent Louis H. Bean submits this Brief in Opposition to the typewritten Petition for Certiorari filed by Petitioners on July 29, 1976. Respondent Bean urges the Court to disregard the printed brief (the content of which varies substantially from the typewritten Petition) subsequently filed by Petitioners in violation of Rule 23(3), RULES OF THE SUPREME COURT OF THE UNITED STATES, which prohibits the filing of a separate brief in support of the Petition. Respondent Bean further urges that the original typewritten Petition for Certiorari be denied for failure to comply with Rule

23(2), RULES OF THE SUPREME COURT OF THE UNITED STATES, which requires that all such petitions be printed in conformity with Rule 39(a), RULES OF THE SUPREME COURT OF THE UNITED STATES. See, *Snider v. All State Administrators, Inc.*, 414 U.S. 685 (1974).

OPINION BELOW

Petitioners seek a Writ of Certiorari to the Supreme Court of Virginia, whose opinion dated April 30, 1976, denied a petition for appeal, and thereby affirmed the judgment of the Circuit Court of Arlington County, dated June 20, 1975.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3) (1966). Jurisdiction thereunder depends upon the timely assertion of a substantial federal question. Respondent Bean submits that Petitioners failed to raise the issue now argued in a timely manner in the state courts, and that, in any event, there is no substantial federal question in this case.

Respondents began this action as a Creditors' Bill in 1972 in the Circuit Court of Arlington County, Virginia, to set aside a transfer by Petitioner Hynning on the ground that it was a fraudulent conveyance under VA. CODE ANN. § 55-80 (1974 Repl. Vol.). The circuit court referred the matter to a Commissioner in Chancery, who held hearings, received documentary evidence, and issued an extensive report finding that the transfer was a fraudulent conveyance. There is no indication in the record that Petitioners ever raised before the Commissioner or the Court the issue of whether his ultimate finding denied Petitioners their property without due

process of law in violation of the fourteenth amendment. U.S. CONST. amend. XIV. Petitioners then filed exceptions to the Commissioner's report in the circuit court. Neither the exceptions (Appendix p. 1a) nor a subsequent letter brief filed by Petitioners (Appendix, p. 4a) raised the constitutional issues Petitioners now assert. After reviewing the evidence and hearing arguments, the circuit court affirmed the Commissioner's finding that the conveyance was fraudulent.

The Petitioners first raised their constitutional argument in the Notice of Appeal from the circuit court's affirmance of the Commissioner's report. (Appendix, p. 8a, para. 3). Under Rule 5:7, Rules of the Supreme Court of Virginia, the Supreme Court of Virginia was not bound to consider the question of constitutionality. The Supreme Court of Virginia has held that it will not entertain a constitutional argument for the first time on appeal. *Newlon v. City of Alexandria*, 213 Va. 336, 193 S.E.2d 36 (1972).

The Virginia Supreme Court denied the petition for review. The denial had the effect of affirming the circuit court opinion. (Petitioners' Appendix, p. 6a) In the absence of a clear showing that the constitutional issues were considered and decided by the Supreme Court of Virginia, petitioners are now foreclosed from relying upon such issues in order to invoke the jurisdiction of this Court. *Simmons v. West Haven Housing Authority*, 399 U.S. 510, 513 (1970). Cf., *Raley v. Ohio*, 360 U.S. 423, 436 (1959).

Although several opportunities were afforded Petitioners to present their constitutional objections, both at the Commissioner's hearings and in the circuit court, they did not do so. Because the constitutional objections were not raised in a timely manner under Virginia procedure,

they may not now be the basis of this Court's jurisdiction. *Edelman v. California*, 344 U.S. 357, 358-59 (1953). Failure of the Petitioners to comply with state procedures is an adequate and independent state ground on which the decision below should now be allowed to stand. *Edelman v. California*, *supra*.

QUESTIONS PRESENTED

Whether a *prima facie* case of fraud, based on circumstantial evidence alone produced in an adversary proceeding, amounts to a deprivation of property without due process of law?

Whether Petitioners may now raise questions regarding a state court's adherence to its own procedural rules when such issues were either waived by Petitioners or decided against them in the state courts?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

1. U.S. CONST. amend. XIV, § 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. 28 U.S.C. § 1257(3) (1966): State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

3. VA. CODE ANN. § 55-80 (1974 Repl. Vol.):

"§ 55-80. Void fraudulent acts; bona fide purchasers not affected.—Every gift, conveyance, assignment or transfer of, or charge upon, any estate, real or personal, every suit commenced or decree, judgment or execution suffered or obtained and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are or may be lawfully entitled to shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void. This section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor. (Code 1919, § 5184.)

4. Rule 23, RULES OF THE SUPREME COURT OF THE UNITED STATES:

The Petition for Certiorari

* * *

2. The petition for writ of certiorari shall be printed in conformity with Rule 39.

3. All contentions in support of a petition for writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph (h) of paragraph 1 of this rule. No separate brief in support of a petition for writ of certiorari will be received, and the clerk will refuse to file any petition for writ of certiorari to which is annexed or appended any supporting brief.

5. Rule 39, RULES OF THE SUPREME COURT OF THE UNITED STATES:

Form of Appendices, Petitions, Briefs, Etc.

1. All appendices, petitions, motions and briefs, printed for the use of the court must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume, having pages 6 1/8 by 9 1/4 inches and type matter 4 1/6 by 7 1/6 inches, except that appendices in patent cases may be printed in such size as is necessary to utilize copies of patent documents. They and all quotations contained therein, and the matter appearing on the covers, must be printed in clear type (never smaller than 11-point type) adequately leaded; and the paper must be opaque and unglazed. If footnotes are included they may not be printed in type smaller than 9-point.

* * *

6. Rule 5:7, Rules of the Supreme Court of Virginia:

Objections in Trial Courts; Effect of Failure to Assign Error

This court will not notice any objection requiring a ruling of the trial court unless the ground of objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this court to attain the ends of justice. Only errors assigned in the notice of appeal and assignments of error will be noticed by this court and error not so assigned will not be admitted as a ground of a reversal of a decision below.

STATEMENT OF THE CASE

This case began as a Bill to Enforce a Judgment Lien in the Circuit Court of Arlington County, Virginia, brought by Respondent Gladys L. Baker. Other creditors of Petitioner Hynning, including Respondent Bean, intervened and the matter was referred to a Commissioner in Chancery to determine, *inter alia*, whether the conveyance from Hynning (who happens to be a lawyer) to Hynning and his daughter, Petitioner Carol H. Smith, as joint tenants with right of survivorship, was a fraudulent conveyance which should be set aside under VA. CODE ANN. §55-80 (1974 Repl. Vol.) The Commissioner took proof consisting of answers by Hynning to interrogatories as well as documentary evidence. After Hynning indicated in answers to interrogatories that the consideration for the conveyance was the transfer of insurance policies from Smith to Hynning and the cancellation of Hynning's promissory note held by Smith, counsel for Respondent Louis H. Bean sought a *subpoena duces tecum* for the note and insurance policies to be produced.

These documents were not produced and have never been produced. Nor was there offered proof of any kind

that they were ever transferred by Smith to Hynning. The documents produced indicate possession of the note by Smith, but indicate absolutely nothing as to any transfer from Smith to Hynning as consideration for the conveyance. These meaningless documents were transmitted by Petitioners' counsel on September 5, 1974. On September 10, 1974, counsel for Respondent Bean submitted a letter brief to the Commissioner. A hearing was scheduled for September 13, 1974, for the taking of further proof. However, as noted in the Commissioner's report, "[N]o one appeared to put on any further evidence." (Appendix, p.9a). The Commissioner entered his report finding that the conveyance was fraudulent on October 10, 1974.

On December 26, 1974, counsel for Petitioners filed Exceptions to the Commissioner's report in the Circuit Court of Arlington County. (Appendix, p.8a) Counsel for Petitioners stated in paragraph 2 of the Exceptions that "Defendants take no exception to the Commissioner's utilizing the Answers to Interrogatories in arriving at his findings. . . ." (Appendix, p. 2a) No exception states as a ground that the procedure followed by the Commissioner violated Petitioners' constitutional right to due process of law. In a letter brief dated April 22, 1975, to Judge Charles H. Duff of the Circuit Court of Arlington County, counsel for Petitioners again made no mention of any constitutional infirmity in the procedure or conclusions reached by the Commissioner. (Appendix, p. 4a) In a letter opinion dated April 29, 1975, Judge Duff, after a review of the evidence and findings of the Commissioner, and after hearing argument of counsel, affirmed the Commissioner's report. Judge Duff held that the Commissioner's findings were "supported by the totality of the evidence." (Petitioners' Appendix, p. 4a)

An order was entered on June 20, 1975, affirming the Commissioner's report, and a decree of sale postponed pending appeal.

The first mention of constitutional questions occurred in the Notice of Appeal Petitioners filed on July 18, 1975. (Appendix, p. 8a). The Supreme Court of Virginia affirmed without opinion the decree of the Circuit Court on April 30, 1976. (Petitioners' Appendix, p. 6a) A Petition for a Writ of Certiorari was filed on July 29, 1976.

ARGUMENT

I.

DUE PROCESS OF LAW IS NOT DENIED BECAUSE THE PROOF OF FRAUD IN AN ADVERSARY PROCEEDING IS BASED ON CIRCUMSTANTIAL EVIDENCE.

There is no substantial federal question involved in this case; therefore this Court lacks jurisdiction. *Zucht v. King*, 260 U.S. 174 (1922). Whether or not a fraudulent conveyance has taken place has traditionally been considered a matter of local law, not a federal question. *Thompson v. Fairbanks*, 196 U.S. 516 (1905); *Cramer v. Wilson*, 195 U.S. 408 (1904). In the present case, the finding that the conveyance to Petitioners was fraudulent was made only *after* an evidentiary hearing at which Petitioners were represented by counsel and the determination made by a Commissioner, who is also an attorney. Although exceptions were taken by Petitioners, no exception raised an issue of constitutional infirmity, and Petitioners, again represented by counsel, were heard on the issue by a Circuit Judge who affirmed the finding of fraudulent conveyance. They then took an appeal to the Virginia Supreme Court, which, after considering the

record, refused the petition for review. Thus, the issue presented in this case has been thoroughly examined by the courts of the Commonwealth of Virginia. Petitioners have had numerous opportunities to be heard in the state courts on the questions they now raise in this Court. Respondent Bean contends that, in view of Petitioners' failure to fully use these opportunities and in view of the state courts' thorough review, this case is not one in which this Court should disturb the determination of state courts.

This is not a case where no evidence was presented to support the ultimate finding. *Cf. Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960). Rather, considerable evidence was introduced, from which the Commissioner could, and did, reasonably determine that the transfer was a fraudulent conveyance. Where evidence is presented from which the conclusion reached could have been logically drawn, there is no violation of due process of law, and this Court will not second-guess evidentiary findings of state tribunals. *See generally, Wood v. Strickland*, 420 U.S. 308, 323-24, 326 (1975).

This Court should be especially reluctant to second-guess presumptions and conclusions established not by statutes of state-wide application but by judicial inquiries into factual situations.

Nor have Petitioners' rights to due process of law been impaired. The Commissioner's report and the Circuit Court both found that there was ample evidence to raise a *prima facie* case of fraud, and that this evidence was not rebutted by Petitioners. The conveyance was from Hynning to himself and his daughter as joint tenants with right of survivorship. There was no settlement statement, appraisal, valuation, or deed of trust taken for what was alleged to be a transfer for consideration. At the time of

the conveyance there were two unsatisfied money judgments against Hynning outstanding in Arlington County, Virginia, and real estate tax liens against the property. Hynning retained possession of the property after the conveyance. In response to interrogatories from Respondent Bean, Hynning stated that the transfer was for consideration consisting of a promissory note and proceeds of certain life insurance policies, both of which were said to have been transferred from Smith to Hynning. A *subpoena duces tecum* was issued for these documents, but they were never produced. Nor did Smith, a party throughout and one who, by the voiding of the conveyance, lost a present interest in one-half the property and a survivorship interest in the entire property, ever come forward with any evidence regarding the transaction. It is manifest from these circumstances—the relationship of the parties, outstanding judgments at the time of the conveyance, retention of possession by the grantor, and a failure on the part of those in possession of the alleged evidence of consideration to come forward with such evidence—that the Commissioner and circuit court reasonably concluded that the transfer was a fraudulent conveyance.

This Court has in numerous cases upheld as constitutional evidentiary presumptions which create a *prima facie* case of civil liability. *See, e.g., Mobile, Jackson, and Kansas City R.R. v. Turnipseed*, 219 U.S. 35 (1910) (upholding a Mississippi statute making proof of injury by a train *prima facie* evidence of negligence on the part of the railroad), *Anderson National Bank v. Lockett*, 321 U.S. 233 (1944) (upholding a Kentucky statute creating a rebuttable presumption of abandonment of demand bank deposits from the fact of ten years' inactivity). The rule

was succinctly stated in *Adler v. Board of Education of New York City*, 342 U.S. 485 (1952):

“Where . . . the relation between the fact found and the presumption is clear and direct and is not conclusive, the requirements of due process are satisfied.”

342 U.S. at 496. In the present case there was ample factual proof from which the presumption of fraud was clear and direct.

Petitioners cite two cases in support of their constitutional argument, *Bailey v. Alabama*, 219 U.S. 219 (1911), and *Manley v. Georgia*, 279 U.S. 1 (1929). Both involve statutory presumptions of criminal fraud. In *Bailey* a state rule of evidence effectively rendered the presumption of fraud irrebuttable. In *Manley* the presumption (that a bank officer or director is guilty of criminal fraud on proof that the bank is insolvent), while rebuttable, was patently unreasonable, especially in light of the fact that under Georgia law at that time banks could loan up to 85 percent of their deposits, making insolvency due to mild panic a very real and frequent possibility bearing no relation to fraudulent conduct.

The present case does not involve blanket statutory presumptions of criminal liability. Rather it is a civil matter in which a logical and reasonable presumption based on evidence was raised against Petitioners in a judicial proceeding and which they failed to refute, although presented many opportunities to do so.

The question involved is inherently one of local law requiring judicial determinations based on factual patterns which will vary from case to case. The issues Petitioners raise have been definitively settled by this Court in several cases. This case has no evidentiary or

logical facets which distinguish it from cases clearly establishing that a reasonable presumption from a proven fact comports with the due process clause of the fourteenth amendment. Therefore, the petition should be denied.

II.

THE ALLEGED FAILURE OF THE VIRGINIA STATE COURTS TO FOLLOW VIRGINIA LAW DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The question of whether the Virginia courts have followed their own rules, in the absence of a constitutional infirmity resulting from their failure to do so, is strictly a matter of Virginia law and has been decided against Petitioners after thorough review in the Virginia courts. It is not now subject to review in this Court. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).

In support of their argument on this point Petitioners cite *Vitarelli v. Seaton*, 359 U.S. 535 (1959), a case which has nothing to do with constitutional questions, but rather holds that, as a matter of federal law, certain federal statutes must be complied with. Petitioners make no argument (apart from that discussed in Part I of this Argument) that the alleged failure of the Virginia courts to follow their own rules and authorities has resulted in the denial of their constitutional rights. Their right to compliance is, therefore, a question of state law for the Virginia courts alone. There is no substantial federal question presented. *Murdock v. City of Memphis*, *supra*.

CONCLUSION

For the reasons stated, Respondent Louis H. Bean submits that Petitioners did not raise the constitutional issues in a timely manner in the state courts. Additionally, the questions presented here inherently concern local law and turn on the particular facts in this case. Finally, on the merits of the case, at least three Virginia tribunals have found against Petitioners. Thus, Petitioners have not been deprived of their property without due process of law. Lastly, no substantial Federal question is presented by this petition.

As a result, the Petition for Certiorari should be denied and the decision of the Supreme Court of Virginia allowed to stand.

Respectfully submitted,

TERRENCE NEY

Boothe, Prichard & Dudley
4085 University Drive
Fairfax, Virginia 22030

*Attorneys for Respondent,
Louis H. Bean.*

APPENDIX

APPENDIX

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

GLADYS L. BAKER,)	
)	
Complainant)	
)	IN CHANCERY
vs.)	NO. 23183
)	
CLIFFORD J. HYNNING, et. al.)	
)	
Defendants)	

EXCEPTIONS TO COMMISSIONER'S REPORT

COME NOW the Defendants, Clifford J. Hynning and Carol H. Smith, by counsel, and file herewith their exceptions to the Commissioner's Report, returned herein on December 17, 1974, giving notice that said Defendants intend to present to this Court the following exceptions and objections and argue that the said Report should be disapproved and the findings of fact and conclusions of law therein be reversed:

1. Defendants except to the finding on page 9 of said Report that the Answers to Interrogatories filed by counsel on behalf of Defendant Hynning were incomplete and evasive; Defendants state affirmatively that counsel for Louis H. Bean, who filed the subject interrogatories, made no motion to compel discovery under Rule of Court 4:12(3) on the ground that said answers were incomplete and evasive and such objection is therefore waived.

2. Defendants take no exception to the Commissioner's utilizing the Answers to Interrogatories in arriving at his findings, but take exception to the fact that the Commissioner utilized certain of the Answers and refused to consider other Answers in arriving at his findings; specifically, the Commission refused to consider the Answer to Interrogatory 4 relating to the consideration paid by Carol H. Smith in the acquisition of her interest in the property which is the subject matter of this cause.

3. Defendants except to the finding of the Commissioner, on pages 9 and 10 of said Report, that Defendant Hynning failed to produce sufficient evidence of consideration received by him for the transfer of the subject property by him to himself and his daughter.

4. Inasmuch as same has influenced the Commissioner's findings of fact and conclusions of law, Defendants except to the finding of the Commissioner, on page 10 of said Report, that Defendant Carol H. Smith has failed to appear in this matter, which finding is internally inconsistent with the Commissioner's finding that Carol H. Smith is represented by counsel, which counsel has appeared in this matter.

5. Defendants except to the findings of the Commissioner, beginning on page 10 of said Report, that a *prima facie* case of fraud has been established by the evidence.

6. Defendants except to the finding and ruling of the Commissioner, on pages 10 and 11 of said Report, that the deed from Clifford J. Hynning to Clifford J. Hynning and Carol H. Smith, as joint tenants with common law right of survivorship, dated September 9, 1971, is a void and fraudulent conveyance as defined by Section 55-80, 1950 Code of Virginia, as amended.

7. Defendants except to the finding of the Commissioner, on page 11 of said Report, that Gladys L. Baker

and Louis H. Bean are entitled to have the whole of the property which is the subject matter of this cause sold to satisfy the claims of all lien creditors.

8. Defendants except to the finding of the Commissioner, impliedly made on page 4 of said Report, that the mere existence of an outstanding obligation gives a creditor the right to challenge a conveyance made prior to the time that such obligation has been adjudged valid by the appropriate Court of record and reduced to judgment.

Respectfully submitted,
CLIFFORD J. HYNNING
CAROL H. SMITH
By Counsel

BARHAM, RADIGAN AND SUITERS
2009 North 14th Street, Suite 410
Arlington, Virginia 22216

By: /s/ Frank E. Brown, Jr.
Frank E. Brown, Jr., Counsel for
Clifford J. Hynning and Carol H. Smith

[Certificate of Service Omitted in Printing]

April 22, 1975

The Honorable Charles H. Duff
Judge, Circuit Court of Arlington County
Arlington County Courthouse
Arlington, Virginia 22201

re: Baker v. Hynning
In Chancery No. 23183

Dear Judge Duff:

Further to the arguments made before your Honor in the above-styled case on April 21, 1975, I feel it necessary that some elaboration be made with regard to the \$22,000 note, made by Clifford J. Hynning and payable to his wife, Martha Hynning, which has been identified in the Interrogatories as part of the consideration for the transfer of an interest in the real estate in question to Mrs. Smith.

As stated in the Court, and previously to other counsel, the original of the note cannot be located. Consequently, neither counsel nor the Defendants can make any positive representation as to its whereabouts; however, counsel would suggest that it is certainly not uncommon for a paid note to be destroyed, as such is the most effective means of cancellation.

Counsel for the Defendants, in response to the Subpoena *duces tecum*, stated that the original note could not be found (counsel originally believed that Mrs. Smith had the note, but this was in error and was corrected by Mr. Hynning). However, as evidence that the note did, in fact, exist, counsel cited Mr. Ney and the Commissioner to the official public records of the Circuit Court of Arlington County, which counsel contends are before the Court and properly the subject of judicial

notice. A copy of my letter to Mr. Ney, dated September 5, 1974, is attached hereto.

For the benefit of the Court and other counsel, the following specific information is supplied from said records:

1. The Will of Martha H. Hynning is found in Will Book 53 at page 243 and specifically recites possession of a note in the amount of \$22,000, made by Mr. Hynning and secured by deed of trust on 3700 North Military Road, dated July 28, 1960. The note was bequeathed to Mrs. Smith in trust. A portion of that trust was supplied to counsel for Mr. Bean in my letter of September 5, 1974.

2. An appraisal of the estate of Martha Hynning appears in Fiduciary Settlement Book 0-3 at page 384 and shows as an asset of the estate a note made by Clifford Hynning in the amount of \$22,000. The estate appraisers certifying that entry were L. Lee Bean, Stefan C. Long and Isabel C. Mackey.

3. I attached herewith the relevant schedules of the Virginia Inheritance Tax Return for the estate of Martha H. Hynning showing, in schedule F, the note in the amount of \$22,000, and in schedule K, that Carol Smith (then Hynning) was sole beneficiary of the estate. I also attach the Memorandum of Inheritance Tax from the Department of Taxation showing the total amount of the estate, and particularly showing that the value of the note was included as a taxable asset. This information appears in Fiduciary Settlement Book 4 at page 28.

In view of the above, Defendants reiterate their argument that ample proof of the existence of this note is and has been a matter of public record, and that the

inability to produce the original of the note in no way justifies an inference that same never existed.

Very truly yours,
Frank E. Brown, Jr.

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

GLADYS L. BAKER,)	
)	
Complainant)	
)	IN CHANCERY
vs.)	NO. 23183
)	
CLIFFORD J. HYNNING, et. al.)	
)	
Defendants)	

NOTICE OF APPEAL AND ASSIGNMENTS
OF ERROR

NOTICE OF APPEAL

COME NOW the Defendants, CLIFFORD J. HYNNING and CAROL H. SMITH, by counsel, and hereby give notice to all parties that they will appeal to the Supreme Court of Virginia for a review and reversal of the judgment herein entered by the Honorable Charles H. Duff, Judge of the Circuit Court of Arlington County, Virginia, on June 20, 1975, and further giving notice that the errors hereinafter set forth are hereby assigned and will be relied upon in the Petition for Appeal.

THIS NOTICE is given and filed with the Clerk of the Circuit Court of Arlington County, Virginia in accordance with Rule 5:6 of the Rules of the Supreme Court of Virginia now in force.

The Interrogatories of Complainants to Defendants, and the exhibits produced in response to a subpoena *duces tecum* will become part of the Record in accordance with Rule 5:9 of the Rules of Court.

ASSIGNMENTS OF ERROR

The errors hereinafter mentioned are hereby assigned as follows:

1. The Court erred in holding that requested attorney's fees in the amount of \$2,000, payable to James H. Simmonds, Esquire, were reasonable.

2. The Court erred in sustaining the following findings made by the Commissioner:

A. That the Deed from CLIFFORD J. HYNNING to CLIFFORD J. HYNNING and CAROL H. SMITH, as joint tenants with common law right of survivorship, dated May 9, 1971, is void and fraudulent as defined by §55-80, Code of Virginia, 1950, as amended.

B. That a *prima facie* case of fraud had been established by the evidence.

C. That the burden was on Defendant Hynning to produce evidence to sustain the transfer of the subject property.

D. That Defendant Hynning failed to produce sufficient evidence of consideration received by him for the transfer of the subject property by him to himself and his daughter.

E. That the Answers to Interrogatories filed by Defendant Hynning were incomplete and evasive.

F. That since the Answers to Interrogatories filed by Defendant Hynning were not under oath, they would be considered only as "admissions against interest."

3. The Court erred in sustaining a finding of fraud without an evidentiary hearing on the record in violation of Article I, Section 11 of the Constitution of Virginia and Amendment 14 of the Constitution of the United States.

Respectfully submitted,

CLIFFORD J. HYNNING and
CAROL H. SMITH By Counsel

[Excerpts from Report of Commission in The Circuit
Court of Arlington County, Virginia,
Chancery No. 23183]

Pursuant to a Decree of Reference entered May 24, 1974, whereby the said cause was again referred to the undersigned Commissioner in Chancery who was directed to inquire and report as follows:

(a) Upon those matters contained in the Decree of Reference previously entered in this cause; and

(b) To ascertain and report whether all parties of interest are properly before the Court; and

(c) To ascertain and report to the Court whether the conveyance of an interest in the subject property from CLIFFORD J. HYNNING to CAROL H. SMITH should be set aside as being contrary to Section 55-80, 81 of the Code of Virginia.

Pursuant to said Decrees and after Notice of the taking of depositions having been given to all parties who had filed Answers or otherwise appeared in this cause, a copy of said Notices being filed herein, your Commissioner did proceed at his office at 2060 North 14th Street, Arlington, Virginia, on November 14, 1973 at 10:30 o'clock A.M., there being present FREDERICK J. HARLFINGER, Defendant, JOHN NINIAN BEALL, Counsel for Complainant, FRANK E. BROWN, JR., Counsel for CLIFFORD J. HYNNING, Defendant, and was completed at a hearing at his office on August 27, 1974, at 10:00 o'clock A.M., when your Commissioner proceeded to take additional testimony provided by the parties touching the matters of inquiry before him reducing their examination to writing in the form of depositions, there being present at the hearing, FRANK J. [p. 2] SANDO, Counsel for Ulysses G. Auger, Intervenor; R. TERRENCE NEY, Counsel for Louis H. Bean, Intervenor; JAMES H. SIMMONDS, Counsel for Frederick J. Harlfinger, Defendant; JOHN NINIAN BEALL, Counsel for Gladys L. Baker, Complainant; and FRANK E. BROWN, JR., Counsel for Clifford J. Hynning and Carol H. Smith, Defendants.

Your Commissioner reports that by agreement of Counsel for all present this cause was continued to September 13, 1974 at 2:00 o'clock P.M. for taking any further depositions. Your Commissioner reports that at that time and date no one appeared to put on any further evidence. Your Commissioner returns said depositions and exhibits which are made a part of the report and begs leave to report the following matters: [p. 3]

* * *

ITEM FIVE

Your Commissioner finds from the evidence and from his examination of the land records of Arlington County, Virginia, that at the time the Defendant, CLIFFORD J. HYNNING, conveyed the [p. 8] above described property to himself and his daughter, CAROL J. SMITH, as joint tenants with the common law right of survivorship, by deed dated September 9, 1971 and recorded September 17, 1971 in Deed Book 1765 at page 497 of said Arlington County, Virginia, land records, that in addition to the two said deeds of trust against the said property, there was a judgment against CLIFFORD J. HYNNING obtained by ULYSSES G. AUGER in the sum of \$8,600.00 docketed in the Clerk's Office of Arlington County, Virginia, on May 11, 1971 in Judgment Lien Docket Book 103 at page 186. Reference is made to the said judgment more particularly described in ITEM TWO (d) of this report.

Your Commissioner further finds that most of the judgment lien creditors listed in ITEM TWO of this report obtained judgments against MR. HYNNING on obligations that were in existence at the time of the execution of the aforesaid deed. There were also outstanding real estate taxes due on the aforesaid property.

Your Commissioner further finds that an order was entered in this cause on May 24, 1974, directing CLIFFORD J. HYNNING to answer in writing and under oath the interrogatories submitted to him by LOUIS H. BEAN, Intervenor, on or before July 10, 1974. Your Commissioner further finds that the said answers to interrogatories were filed on June 20, 1974 by Counsel for CLIFFORD J. HYNNING and were not under oath as directed by Court; however, your Commissioner con-

siders them as admissions against interest and found that they were incomplete and evasive.

Your Commissioner further finds that there was no settlement statement made to show this transfer and no appraisal was done on the property to show the valuation. Your Commissioner further finds that the said CLIFFORD J. HYNNING failed to produce [p. 9] sufficient evidence of consideration received by him for the transfer of this property by him to himself and his daughter; namely, a \$22,000.00 promissory note and certain insurance policies aggregating \$20,000.00 as directed in the *Subpoena Duces Tecum* issued by the Clerk of the Court on August 22, 1974.

Your Commissioner further finds that the said CLIFFORD J. HYNNING is still in possession of the said property and that his daughter, CAROL HYNNING SMITH, has failed to appear or offer evidence, although she is represented by the same Counsel who represents MR. HYNNING.

Your Commissioner is of the opinion, based on the evidence, that the evidence shows a *prima facie* case of fraud and the burden shifts to the upholder of the transaction to establish its fairness. This he has failed to do. Nearly all of the badges of fraud are present in this case. Fraud can be clearly inferred from the facts and circumstances involved here that MR. HYNNING has attempted by this conveyance to hinder, delay and defraud his creditors by wrongfully withdrawing his property from the reach of the said creditors.

Your Commissioner further finds from his examination of the title and from all of the evidence presented in this cause, including MR. HYNNING'S admission and his failure to admit certain facts through his interrogatories, that the deed from CLIFFORD J. HYNNING to CLIF-

FORD J. HYNNING and CAROL H. SMITH, as joint tenants with the common law right of survivorship to the survivor of either of them, dated September 9, 1971 and recorded September 17, 1971 [p. 10] in Deed Book 1765 at page 497 among the said County land records is a void and fraudulent conveyance as defined by Section 55-80 of the Code of Virginia, and that the Complainant, GLADYS L. BAKER, and Intervenor, LOUIS H. BEAN, are entitled to have the whole property sold to satisfy the lien creditors as set forth in ITEM TWO of this report. Your Commissioner adopts as his memorandum of the law in this case TERRENCE NEY's letter dated September 10, 1974, filed herein. [p. 11]

* * *

/s/Iverson H. Almand
Iverson H. Almand
Commissioner in Chancery

Supreme Court, U. S.
FILED

SEP 10 1976

MICHAEL ROBAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM 1976

Case No. 76-131

CLIFFORD J. HYNNING AND CAROL H. SMITH,
Petitioners,

v.

GLADYS L. BAKER, ET AL.,
Respondent.

**REPLY BRIEF ON PETITION FOR A WRIT OF
CERTIORARI TO THE
SUPREME COURT OF VIRGINIA**

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Attorneys for Petitioners

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CLIFFORD J. HYNNING AND CAROL H. SMITH,
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GLADYS L. BAKER, ET AL.,
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**REPLY BRIEF ON PETITION FOR A WRIT OF
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The opposition brief by respondents argues that the constitutional question of due process hearing has not been timely raised, being first contained in the notice of appeal from the Circuit Court to the Supreme Court of Virginia. The constitutional requirements of the 14th Amendment are limitations on state power, not on the conduct of private litigants. The report of the Commissioner in Chancery was advisory only and had to be confirmed or denied by the Circuit Court. There could be no constitutional issue until the trial court had denied a due-process hearing. The earliest time, therefore, for the raising of the constitutional question was in the notice of appeal from the action of the Circuit Court. The constitutional issue was therefore raised in a timely fashion.

For the rest, the petitioners rest on their arguments presented in the petition for a writ of certiorari.

In concluding, they note that the mere repetition of a contention by the respondents does not add further weight or authority to that contention, such as that there was "evidence", circumstantial or otherwise, to support the finding of fraud. The record, of course, speaks for itself. It is regretted that the respondents did not deal with the specific discussion of the "evidence" in the form of the argument by respondents as the only "specific evidence" to survive in the circuit court, as set forth on pp. 6-10 of the petition.

Such verbal differences as may exist between the type-written petition and the final printed petition are stylistic only, resulting in a shorter petition.

We submit that these contentions by respondents are without merit.

Respectfully submitted,

FRANK E. BROWN, JR.

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and

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